LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUL 19 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1970

No. 71-96

WILLIAM C. MADDEN,

Petitioner,

versus

JAMES L. MADDEN, ET AL.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

WILLIAM G. McRAE
608 Lakeshore Drive, N.E.
Atlanta, Georgia 30307
Attorney for Petitioner

I N D E X

	PAGE
List of Authorities	i
Opinions of the Courts Below	1
Statement of the Grounds on Which the Jurisdiction of this Court Is Invoked	2
Question Presented for Review	2
Constitutional Provisions Which the Case Involves	3
Statement of the Case	4
Argument Amplifying Reasons Relied on for Allowance of the Writ	8
Certificate of Service	15
Appendix I	16
Appendix II	23
Appendix III	14
Appendix IV	40
Appendix V	42

LIST OF AUTHORITIES

	PAGE
Baker v. Baker E. & Co., 242 U.S. 394, 403	9
Freeman v. Alderson, 119 U.S. 185	9
Galpin v. Page, 85 U.S. 350	9
McDonald v. Mabee, 243 U.S. 90	9
Needham v. Thayer, 147 Mass.536	8
Old Wayne Mut. Life Asso. v. McDonald, 204 U.S. 8	13
Pennoyer v. Neff, 95 U.S. 714	5
Postal Telegraph Cable Company v. Newport, 247 U.S. 464	9
Schmidt v. Schmidt, 280 Mass. 216, 182 N.E. 374	5
46 Am.Jur. 2d, Judgments, Sec. 641 -	13
46 Am.Jur. 2d, Judgments, Sec. 657 -	14
46 Am.Jur. 2d, Judgments, Sec. 665 -	13

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. _____

WILLIAM C. MADDEN,

Petitioner,

v.

JAMES L. MADDEN, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of William C. Madden for a writ of certiorari to review a judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts made and entered by said court on the 21st day of April, 1971, a copy of which is hereto appended, respectfully shows to this honorable court:

OPINIONS OF THE COURTS BELOW

A Report of Material Facts upon which the decree of the trial court was based is annexed to this petition as Appendix I.

The opinion and judgment of the Supreme Judicial Court of the Commonwealth of Massachusetts has been reported in Mass. Adv. Sh. (1971) p. 683, a copy of which is annexed to this petition as Appendix II.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The date of the judgment sought to be reviewed and the date of its entry are the 21st day of April, 1971.

There was no provision for and no order respecting a rehearing and there was no order granting an extension of time within which to petition for certiorari.

The case is one involving the deprivation of petitioner by the Commonwealth of Massachusetts of his property without due process of law, in violation of Section 1, Amendment XIV of the Constitution of the United States.

The statutory provision believed to confer jurisdiction upon this court to review the judgment of the court below is United States Code, Title 28, Section 1257(3).

QUESTION PRESENTED FOR REVIEW

Does a husband, who is a nonresident of the Commonwealth of Massachusetts, against whom an action is brought by his wife in a court of the Commonwealth in which she seeks a declaration of status concerning their marriage relationship and a decree in personam against her husband for money, where the husband was not served with process and did not appear generally, but filed a special appearance on the matter of jurisdiction, which was overruled, and a decree in personam requiring

him to pay money to the wife was entered against him, from which he did not appeal, forfeit, because of his failure to appeal, his right to challenge the validity of the decree in personam in a suit brought in the same court seeking modification and enforcement of the decree and attaching his property, in which second suit he likewise was not served with process and did not appear generally, but filed a special appearance challenging the jurisdiction of the court to modify and enforce said decree by seizing his property for such purpose, upon the ground that such decree is void because it denied due process of law to the nonresident husband by the Commonwealth, in violation of the due process clause of Section 1 of the Fourteenth Amendment to the Constitution, or, does the nonresident husband have the right, notwithstanding his failure to appeal from the decree, to challenge the validity of the decree upon said ground in the suit brought to modify and enforce the decree by attaching his property?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

Constitution, Amendment XIV, Section 1, provides:

> "*** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This suit was instituted in the Probate Court of Barnstable County, Massachusetts, by Ann A. Madden (Ann) and a trustee for her under a separation agreement dated February 1, 1955. The defendants are William C. Madden (William), husband of Ann, and the trustees under two trusts administered in Massachusetts. The petition sought the modification and enforcement of a previous decree of said Court dated August 1, 1967, and sought to hold William's property in the trusts to respond to and be applied to the satisfaction of the decree to be rendered. William was not served with process and did not appear generally, but appeared specially and filed a plea to the jurisdiction and motion to dissolve a temporary restraining order directed to said trustees to withhold funds from the trusts from William, and to dismiss the petition, which were denied, without opinion, on June 11, 1968. A copy of said pleading and order thereon is annexed to this petition as Appendix III. William appealed to the Supreme Judicial Court of the Commonwealth of Massachusetts from said order of June 11, 1968, a copy of which appeal is annexed to this petition as Appendix IV.

After a hearing, a final decree was entered April 22, 1969, modifying and enforcing the decree of August 1, 1967, and holding William's property in one of the trusts to respond to and be applied to the satisfaction of the decree as modified, and William filed his claim of appeal from said decree to the Supreme Judicial Court of Massachusetts, a copy of which is annexed hereto as Appendix V. The Supreme Judicial Court modified the decree so as to eliminate an in personam decree against William, which is not material

here, and as so modified the decree was affirmed.

STAGE OF THE PROCEEDINGS IN THE COURT OF FIRST INSTANCE AND IN THE APPELLATE COURT AT WHICH AND THE MANNER IN WHICH THE CONSTITUTIONAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED

The constitutional question was raised in the court of first instance, the Probate Court of Barnstable County, Massachusetts, by defendant's special appearance, plea and motions appended hereto as Appendix III, which were denied, and was raised in the Supreme Judicial Court in defendant's claim of appeal from said denial appended hereto as Appendix IV. Upon appeal from the final decree dated April 22, 1969, and from the denial of his plea to the jurisdiction and motion to dissolve the temporary restraining order and to dismiss the petition, dated June 11, 1968, William argued in his brief that the decree below was erroneous for the reason that the in personam decree of August 1, 1967, requiring him to pay Ann certain sums of money, was void because he was a nonresident who was not served with process and did not appear generally, relying upon the case of Schmidt v. Schmidt, 280 Mass. 216, 182 N.E. 374, which followed the decision of this Court in Pennoyer v. Neff, 95 U.S. 714, holding that a valid personal judgment cannot be rendered by a State court against a nonresident defendant who is not served with process within a State and who does not appear generally; that such a judgment is a denial of due process of law by the State under the Fourteenth Amendment to the Constitution; that such a judgment, if void when rendered, will always

remain void; that if the judgment previously be void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it; that it cannot occupy the doubtful position of being valid if property be found, and void if there be none; that the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently; and that it is essential to the exercise of the power of a State to seize property to satisfy the obligations of absent owners that such property be seized at the commencement of the action. because the jurisdiction of the court to inquire into and determine an absent owner's obligations at all is only incidental to its jurisdiction over the property.

The way in which the Supreme Judicial Court passed upon the constitutional question was to distinguish the Schmidt case, supra, where the nonresident appealed from the decree, whereas William attacked the decree of August 1, 1967 when it was sought to be modified and enforced against his property. The Supreme Judicial Court said:

> "But, in the Schmidt case, supra, the nonresident husband appeared specially and filed a motion to dismiss the petition for want of jurisdiction. The motion was denied, the respondent appealed, and this court reversed.
>
> "' Every court confronted with a law suit of any kind is under both the necessity and the duty of determining whether or not it has jurisdiction to entertain the suit, and it necessarily has

jurisdiction to make this determination. If it determines erroneously that it has jurisdiction, its own erroneous determination does not give it any true jurisdiction of the case as a whole, and its judgment is in general void and therefore subject to collateral attack, but in accordance with principles which also form the basis for the familiar doctrine of res judicata the judgment may, after it becomes final, be binding upon the parties to the suit although not upon others, and the rights of parties may therefore be limited to appeal, writ of error, petition to vacate, or other methods of direct attack. Old Colony Trust Co. v. Porter, 324 Mass. 581, 586' (citations). These principles are properly applicable to an objection to jurisdiction over the person. (Citations).

"In response to Ann's 1967 petition William entered a special appearance and made a special plea to the jurisdiction of the court over him. His special plea was overruled and he did not appeal. The court had jurisdiction to rule on the special plea, and its ruling that it had jurisdiction was binding on him unless set aside on appeal or other direct attack. It follows that he was fully bound by the decree of August 1, 1967, and cannot now attack it collaterally." Mass. Adv. Sh. (1971) supra, pp. 687-688. (Appendix II).

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Petitioner respectfully shows to the court that this is a case of great importance to petitioner, and to every person against whom a State court has or may render a personal decree without first obtaining jurisdiction to that end. The Supreme Judicial Court of Massachusetts has decided a federal constitutional question of substance in a way probably not in accord with applicable decisions of this court, and in a way in conflict with one of its own prior decisions upon the same federal constitutional question.

The decision of the Supreme Judicial Court of Massachusetts sought to be reviewed holds that where a court of that State renders a personal decree for money against a defendant, who was not a resident of the state, and who was not served personally with process within the state, and who appeared only specially to plead the court's lack of jurisdiction, which plea was overruled, such nonresident cannot, in a suit in said court to modify and enforce such decree by attaching his property, show by plea and proof that the decree is invalid for want of due process in its rendition, but that such nonresident defendant is limited to appeal, writ of error, petition to vacate, or other methods of direct attack upon such decree.

Such decision of the Supreme Judicial Court of Massachusetts is in conflict with its own prior controlling decision upon the same constitutional question in the case of Needham v. Thayer, 147 Mass. 536, where the court said:

> "But while a state may make laws binding its own citizens, requiring them to resort to a writ of error, it cannot so bind citizens of other states."

This Court held in Postal Telegraph Cable Company v. Newport, 247 U.S. 464:

> "While res judicata ordinarily is a matter of state law, a decision of the state court which denies asserted federal rights through the application of a former judgment will not conclude this court, if such application be clearly inconsistent with the right to due process of law."

The decisions of this Court with which the decision of the Supreme Judicial Court of Massachusetts are probably in conflict are:

Galpin v. Page, 85 U.S. 350

Pennover v. Neff, 95 U.S. 721

Freeman v. Alderson, 119 U.S. 185

Baker v. Baker E. & Co., 242 U.S. 394, 403

McDonald v. Mabee, 243 U.S. 90

The Massachusetts case of Needham v. Thayer, supra, was cited by this Court as authority for its holding that the judgment which it considered in McDonald v. Mabee, supra, was void, for want of service amounting to due process of law, and ineffective in the State of its rendition, because rendered

contrary to the due process clause of the Fourteenth Amendment to the Constitution; the same attack which William makes upon the personal decree against him dated August 1, 1967.

The fact of the lack of jurisdiction by the trial court over William's person at the time of the entry of the personal decree against him on August 1, 1967, appears on the face of the record, both in the trial and appellate courts.

The trial court found (Appendix I):

> "I find that in the Spring of 1967, Ann received information that William had moved to Georgia for the purpose of obtaining a divorce from her and marrying Mrs. Z. On May 3, 1967, she filed a petition for living apart for justifiable cause. William's address on the petition was listed as Atlanta, Georgia, and service was made by publication. The citation was also mailed by certified mail to William at this Atlanta address, where Ann thought he was living, however, it was returned by the post office, undelivered to the addressee. William entered a special plea to the jurisdiction which was overruled. A hearing was held on August 1, 1967, and it was decreed that Ann was living apart from William for justifiable cause; the custody of the children was given to Ann and based upon the written separation agreement between them, as amended on August 12, 1963, William was ordered to pay Ann the

sum of Five Hundred ($500.00) Dollars per month and One Hundred Sixty-Six and 67/100 ($166.67) Dollars per month for each of the three children, plus educational expenses for the children. No appeal was taken."

The Supreme Judicial Court found (Appendix II, Mass. Adv. Sh. (1971) p. 685):

"On May 3, 1967, Ann filed a petition against William for living apart for justifiable cause under G.L. c. 209, Sec. 32. The petition alleged that William had moved to Georgia on or about December 1, 1966, and that he intended to seek a Georgia divorce in violation of the separation agreement. William was served by publication; a copy of the citation sent to him at an Atlanta address was returned undelivered. On June 9, 1967, he entered a special appearance; he made a special plea to the jurisdiction, which was overruled.

***

"On August 1, 1967, after hearing, a decree was entered on Ann's petition. The decree determined that she was living apart from William for justifiable cause, awarded her custody of the three minor children, and made provisions 'in accordance with a written separation agreement between

> the parties dated February 1, 1955, as amended,' that he pay her $500 a month for her support and $166.67 a month for each of the three children, plus their educational expenses. No appeal was taken from that decree.
>
> ***
>
> "In April, 1968, Ann filed her present petition. A plea to jurisdiction and motion to dissolve a temporary restraining order and to dismiss the petition were denied in June, 1968. After hearing, a final decree was entered April 22, 1969."

The appellate Court further stated in its opinion (at page 683 of Appendix II):

> "William C. Madden (William) appeals from a decree on a petition in equity brought by Ann A. Madden (Ann) and a trustee for her under a separation agreement dated February 1, 1955. The petition sought modification and enforcement of a previous decree dated August 1, 1967, awarding Ann, as William's wife, separate support for herself and their three minor children *** and sought to hold his property in (two) trusts to respond to and be applied to the satisfaction of the decree to be rendered. William was not served with process, but appeared specially to contest the jurisdiction of the court and to protect his property interest in the trusts."

A collateral attack is permitted upon a judgment because of absence of jurisdiction where the want of jurisdiction appears upon the face of the record, or where the record affirmatively shows absence of conditions necessary to give the court jurisdiction to affect the rights of a party. 46 Am.Jur. 2d, Judgments, Section 665; Old Wayne Mut. Life Asso. v. McDonald 204 U.S. 8; Baker v. Baker E. & Co., supra. The reason why a collateral attack under such circumstances is permitted was stated by this Court in Galpin v. Page, supra, where it is declared that were the rule otherwise, it would never be possible to attack collaterally the judgment of a court of general jurisdiction, that the answer to the attack would always be that notwithstanding the averment or the evidence, the necessary facts to support the judgment are presumed.

> "It is a general rule of law that a judgment which is null and void is subject to collateral attack, at the instance of the person affected by it, and at any time."
>
> 46 Am. Jur. 2d, Judgments, Section 641.

> "The general rule is that the absence of jurisdiction of a court to render a particular judgment constitutes sufficient cause for a collateral attack upon the judgment whenever it is sought to be enforced or in any suit in which its validity is drawn into question, whether the absence of jurisdiction is in regard to the subject matter, the parties, or, in

proceedings in rem, the res."

46 Am. Jur. 2d, Judgments, Section 657.

The Supreme Judicial Court of Massachusetts erred in its judgment entered April 21, 1971, in holding that William was estopped from attacking the personal decree against him dated August 1, 1967, in this action.

It is respectfully submitted by petitioner that this Honorable Court should reaffirm the supremacy of the Constitution over the laws of a State, and decisions of State courts, which are invoked to deny due process of law to nonresidents, in violation of the due process clause of the Fourteenth Amendment to the Constitution, and to forbid any State from applying the doctrine of res judicata to a former personal judgment against a nonresident of the state, where such application is clearly inconsistent with the right of the nonresident to due process of law under said Amendment.

Wherefore, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this court, directed to the Supreme Judicial Court of Massachusetts to the end that the judgment of the Supreme Judicial Court of Massachusetts may be reviewed and reversed by this Honorable Court.

William C. Madden, Petitioner

By _____
William G. McRae
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the above and foregoing Petition for Certiorari upon the respondents by mailing a copy of same, with air mail postage prepaid, addressed to Daniel J. Fern, Esq., 436 Main Street, Hyannis, Massachusetts 02601, and to Claude B. Cross, Esq., 73 Tremont Street, Boston, Massachusetts 02108, counsel of record for Respondents.

This _____ day of July, 1971.

William G. McRae

Counsel for Petitioner

Address:

608 Lakeshore Drive, N. E.
Atlanta, Georgia 30307
Telephone No. 404-378-2951

APPENDIX I

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT
Barnstable County Equity No. 87

ANN A. MADDEN et al.

v.

JAMES L. MADDEN et al.

Report of the Material Facts.

This is an appeal by William C. Madden (hereinafter called William), from my decree dated April 22, 1969, on a Petition in Equity, brought by Ann A. Madden (hereinafter called Ann), his wife. Said decree provided that a Georgia decree of divorce obtained by William from Ann, dated September 8, 1967, is not entitled to be recognized in this Commonwealth and it also directed that a Trust dated September 6, 1923, established in this Commonwealth by M. E. Madden, for the benefit of his son, William, with three Massachusetts trustees, shall be held to respond to and be applied to the satisfaction of the terms of a previous decree of this Court dated August 1, 1967, wherein it was decreed that Ann is living apart from her said husband, William, for justifiable cause and making financial provisions for her support and that of their three minor children.

I find that William and Ann were married in Newton, Massachusetts, on June 25, 1949, and lived thereafter in this Commonwealth.

Two children were born to them, William C. Madden, Jr. on January 20, 1950, and Grace E. Madden, on June 12, 1951. Trouble between the parties began shortly after their marriage, caused by an alcoholic problem of William, and they separated on October 12, 1954. By separation agreement dated February 1, 1955 (See Exhibit 1) William and Ann covenanted with Herbert E. Hunziker as Trustee for Ann, and with Lothrop Withington, now deceased, as Trustee for William, in essence as follows:

1. It was agreed that Ann may live apart from William.

2. The custody of the two children was given to Ann.

3. William promised to provide, tax free, the sum of Four Hundred ($400.00) Dollars per month for the support of Ann and One Hundred Fifty ($150.00) Dollars per month for the support of each of the two children, plus certain medical and educational expenses.

4. William agreed that if he failed to make said payments, without legal jurisdiction, that he would give the Trustees of the Trust, dated September 6, 1923, a written authorization to make such payments directly to Ann.

I find that in May 1957, there was a conditional reconciliation and the parties lived together until December 1957, when they separated again, due to cruel and abusive treatment of William against Ann. A third child, Margaret L. Madden, was born to them on February 18, 1958. Following this last separation, the Trustees of the M. L. Madden Trust continued for almost six years to make the monthly payments to Ann for her support and that of the children as provided in the

separation agreement. On August 12, 1963, William and Ann orally agreed to modify this agreement to provide for the support of the third minor child, and the aggregate monthly payment was increased to One Thousand ($1,000.00) Dollars. The Trustees made monthly disbursements of One Thousand ($1,000.00) Dollars to Ann for almost five years, the last one being made on March 29, 1968. Shortly after this date, William instructed the Trustees to stop these payments.

Reference the residence of William, I find that in the Fall of 1966, he was living in an apartment in Natick, Massachusetts. He consulted a Boston attorney, stating that he wanted a divorce from Ann as he was in love with a Mrs. Z and wished to marry her. This attorney suggested that he obtain a divorce in Georgia, and as a result, on November 25, 1966, he and this attorney flew to Atlanta, Georgia. They were met by a Georgia attorney there and at that time, plans were made to have William establish a residence in Atlanta and to apply for a divorce. William rented a furnished apartment which was a part of the premises owned by the Georgia attorney and which included a home occupied by him as a residence and also his law office; he opened up a checking account in an Atlanta bank, and made a small deposit and also arranged for telephone service. At 7 p.m. that same evening, he and his Boston attorney flew back to Boston. During the next two months, William spent some time at the Atlanta address and some time in the Natick, Massachusetts area, returning to Georgia on January 29, 1967. He also spent the period from March 3 to March 26 and several periods of a few days each during the next few months in Massachusetts.

I find that William and Ann filed joint State and Federal Income Tax Returns in March 1967, for the year 1966, and William listed Natick, Massachusetts, as his address. He deposited in his checking account in the Natick Trust Company the weekly distribution checks paid him by the Trustees until at least mid-March 1967, and maintained this checking account until November 1967. In the latter part of March 1967, he made his first deposit of the weekly Trustee check in the First National Bank of Atlanta. He still has an address in Atlanta, and lives there part of the time, but he has never purchased a home there and lives in a partly furnished small apartment, although his income from the two trusts, the M. L. Madden Trust and a Trust under the will of Grace E. Madden, is about Fifty Two Thousand ($52,000.00) Dollars per year.

I find that on July 2, 1967, William filed a petition for divorce in Superior Court, DeKalb County, Georgia, on the grounds of desertion, alleging that he had been a bona fide resident of the State of Georgia for a period of more than six months previous to that date, as required by Section 30-107 of the Code of Georgia. (See Exhibit 11). The petition failed to list the names of the three minor children of the parties, although required by the Georgia Code. (Exhibit 11). The petition also failed to list the petition for living apart for justifiable cause filed by Ann against William in this Court on May 3, 1967. Service was made on Ann by publication and mailing a copy of the petition to her at her address in this County. Ann did not file an appearance in this case and William was granted a decree of divorce on September 8, 1967. He married Mrs. Z on September 15, 1967. Following their marriage, a

home in Barnstable County was purchased in her name, where they live part of the year.

I find that William did not have a bona fide residence in the State of Georgia for the requisite period before he filed a petition for divorce; that his failure to list the names of the children in his petition for divorce was intentional and for the purpose of deceiving the Georgia Court, and that his decree of divorce is not entitled to be accorded full faith and credit and to be recognized in this Commonwealth.

I find that in the Spring of 1967, Ann received information that William had moved to Georgia for the purpose of obtaining a divorce from her and marrying Mrs. Z. On May 3, 1967, she filed a petition for living apart for justifiable cause. William's address on the petition was listed as Atlanta, Georgia, and service was made by publication. The citation was also mailed by certified mail to William at this Atlanta address, where Ann thought he was living, however, it was returned by the post office, undelivered to the addressee. William entered a special plea to the jurisdiction which was overruled. A hearing was held on August 1, 1967, and it was decreed that Ann was living apart from William for justifiable cause; the custody of the children was given to Ann and based upon the written separation agreement between them, as amended on August 12, 1963, William was ordered to pay Ann the sum of Five Hundred ($500.00) Dollars per month and One Hundred Sixty-Six and 67/100 ($166.67) Dollars per month for each of the three children, plus educational expenses for the children. No appeal was taken.

On April 23, 1968, Ann filed a Petition

in Equity against William and against the Trustees of the M. L. Madden Trust dated September 6, 1923, and the Trustees under the will of Grace E. Madden, both Trusts being for the benefit of William. The petition alleged that William had failed to make the monthly payments for support required by the separation agreement and by the decree of this Court dated August 1, 1967, and that he had refused to appoint a successor trustee as provided in the separation agreement. The petition prayed that the Court appoint said successor trustee and that the property interest of William in said Trusts be held to respond to and be applied to the satisfaction of the support payments ordered by the August 1, 1967 decree and that the terms of said decree be modified accordingly.

My decree dated April 22, 1969, provided in summary that:

1. The Georgia decree of divorce obtained by William is not entitled to be accorded full faith and credit and to be recognized in this Commonwealth.

2. William is directed to appoint forthwith a successor Trustee under the separation agreement.

3. The Trust instrument dated September 6, 1923, and the income therefrom is hereby held to respond to and be applied to the satisfaction of the terms of the required payments for the support of Ann and the three minor children, and the decree of this Court dated August 1, 1967, is modified accordingly.

4. The Trust under the will of Grace E. Madden and the income therefrom may not be held to respond to and be applied to the

satisfaction of the terms of said support payments.

From this decree, William has appealed.

ALFRED C. KNIGHT

Judge of Probate Court

Filed May 23, 1969.

APPENDIX II.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

Published under authority of Chapter 402 of Acts of 1935

WRIGHT & POTTER PRINTING COMPANY, 32 DERNE STREET, BOSTON

No. 7441.

ANN A. MADDEN & another *vs.* JAMES L. MADDEN & others, trustees, & another.

Barnstable. February 2, 1971. — April 21, 1971.

Present: TAURO, C.J., SPALDING, CUTTER, SPIEGEL, & BRAUCHER, JJ.

Jurisdiction, Nonresident, Divorce proceeding. *Judgment. Res Judicata. Contract*, Separation agreement. *Husband and Wife*, Separate support. *Divorce*, Jurisdiction, Foreign divorce. *Probate Court*, Jurisdiction. *Domicil. Constitutional Law*, Full faith and credit, Divorce.

Case heard in the Probate Court for the county of Barnstable by *Knight*, J.

BRAUCHER, J. William C. Madden (William) appeals from a decree on a petition in equity brought by Ann A. Madden (Ann) and a trustee for her under a separation agreement dated February 1, 1955. The petition sought modification and enforcement of a previous decree dated August 1, 1967, awarding Ann, as William's wife, separate support for herself and their three minor children. The other defendants are trustees under two trusts administered in Massachusetts, one established by William's father in 1923 (the M. L. Madden trust), and one established under the will of his mother by a codicil executed in 1942 (the Grace E. Madden trust). William's income as life beneficiary of the two trusts is about $52,000 a year, and the petition sought to hold his property in the trusts to respond to and be applied to the satisfaction of the decree to be rendered. William was not served with process, but appeared specially to contest the jurisdiction of the court and to protect his

property interest in the trusts. The judge made a report of material facts, and the evidence is reported.

William and Ann were married in Massachusetts in 1949 and thereafter lived in Massachusetts. One child was born to them in 1950 and another in 1951. They separated in October, 1954, and entered into a separation agreement dated February 1, 1955. The separation agreement, made between Ann and William and their trustees, provided that Ann might live apart from William and gave custody of the two children to Ann; William promised to provide, tax free, $400 a month for her support and $150 a month for the support of each child, plus certain medical and educational expenses, and agreed that if without legal justification he failed to make payments by the fifth of each month he would give the trustees written authorization to make the payments directly to Ann.

In May, 1957, there was a conditional reconciliation; the parties lived together until December, 1957, and a third child was born to them in February, 1958. For almost six years after the last separation in December, 1957, the trustees of the M. L. Madden trust made the monthly payments provided in the separation agreement. In August, 1963, William and Ann orally agreed to modify the separation agreement to provide for the support of the third child, and the aggregate monthly payment was increased to $1,000. Monthly payments of $1,000 were made by the trustees until March 29, 1968.

In the fall of 1966, William was living in an apartment in Natick, Massachusetts. He told a Boston attorney that he wanted a divorce from Ann in order to marry a Mrs. Z. On November 25, 1966, he and the attorney flew to Atlanta, Georgia, to establish William's residence there as a basis for divorce. They met a Georgia attorney, rented a furnished apartment on the premises of the Georgia attorney for roughly $10 a week, opened a checking account in an Atlanta bank, arranged for telephone service, and flew back to Boston that evening. Since then William has spent some time in Atlanta and some time in Massachusetts. His checks from the trusts were deposited in a Natick bank until March,

1967, and in March William and Ann filed joint State and Federal tax returns for 1966, showing a Massachusetts address for William.

On May 3, 1967, Ann filed a petition against William for living apart for justifiable cause under G. L. c. 209, § 32. The petition alleged that William had moved to Georgia on or about December 1, 1966, and that he intended to seek a Georgia divorce in violation of the separation agreement. William was served by publication; a copy of the citation sent to him at an Atlanta address was returned undelivered. On June 9, 1967, he entered a special appearance; he made a special plea to the jurisdiction, which was overruled.

On July 2, 1967, William filed a petition for divorce in Georgia on the ground of desertion, alleging as required by Georgia law that he had been a bona fide resident of Georgia for six months. The petition failed to list the three minor children of the parties as required by Georgia law, and failed to mention Ann's petition filed May 3, 1967. Ann was served by publication and by mail, but did not appear in the Georgia suit. On July 28, 1967, Mrs. Z purchased a home in Barnstable County, Massachusetts, and William stayed there for a few days in July.

On August 1, 1967, after hearing, a decree was entered on Ann's petition. The decree determined that she was living apart from William for justifiable cause, awarded her custody of the three minor children, and made provisions "in accordance with a written agreement between the parties dated February 1, 1955, as amended," that he pay her $500 a month for her support and $166.67 a month for each of the three children, plus their educational expenses. No appeal was taken from that decree.

On September 8, 1967, a decree of divorce was granted to William in Georgia. He returned to Massachusetts and stayed here from September 8 to September 15, 1967. On September 15, he and Mrs. Z went to Georgia and were married there.

In April, 1968, Ann filed her present petition. A plea to jurisdiction and motion to dissolve a temporary restraining order and to dismiss the petition were denied in June, 1968.

After hearing, a final decree was entered April 22, 1969. The judge found that William did not have a bona fide residence in Georgia for the required period, and that his failure to list the names of the children in his divorce petition was intentional and for the purpose of deceiving the Georgia court, and decreed that the Georgia divorce decree was not entitled to be accorded full faith and credit or to be recognized in this Commonwealth. The decree also directed William to appoint a successor trustee under the separation agreement, held the M. L. Madden trust to respond to and be applied to the satisfaction of the payments for the support of Ann and the three children, modified the decree of August 1, 1967, accordingly, and provided that the Grace E. Madden trust may not be held to respond to and be applied to the satisfaction of the support payments.

William now claims (1) that the decree of August 1, 1967, requiring him to pay Ann certain sums of money, was void because he was a nonresident who was not served with process and did not appear generally; (2) that the separation agreement was a bar to the present suit; (3) that the petition in the present suit fails to allege a basis for relief cognizable in equity, that there was an adequate remedy at law, and that there was no proof that any debt was owed when the petition was filed; (4) that the judge erred in failing to give full faith and credit to the Georgia divorce decree; and (5) that it was error to enter a decree against him personally, directing him to appoint a successor trustee under the separation agreement.

1. *The decree of August 1, 1967.* Ann's 1967 petition was filed under G. L. c. 209, § 32. "It is plain that the court had jurisdiction over the petition, at least so far as concerned custody of the minor children and direction for their personal treatment. . . . The court doubtless had jurisdiction, also, over the relation of the petitioner to the status of her marriage with the respondent so far as necessary to protect her as a resident of this Commonwealth." *Schmidt* v. *Schmidt*, 280 Mass. 216, 218–219. But it is contended that "a valid personal judgment cannot be rendered against a nonresident defendant who is not served with process within

a State and who does not appear" and that "the part of the decree operating as a personal judgment against the respondent (that is ordering him to pay money to the petitioner . . .) was not warranted because the probate court had not acquired jurisdiction to that end over the respondent." *Id.* at 220–221. See *Mosher* v. *Mosher*, 293 Mass. 105, 106; *Wiley* v. *Wiley*, 328 Mass. 348, 351. But in the *Schmidt* case, *supra*, the nonresident husband appeared specially and filed a motion to dismiss the petition for want of jurisdiction. The motion was denied, the respondent appealed, and this court reversed.

"Every court confronted with a law suit of any kind is under both the necessity and the duty of determining whether or not it has jurisdiction to entertain the suit, and it necessarily has jurisdiction to make this determination. If it determines erroneously that it has jurisdiction, its own erroneous determination does not give it any true jurisdiction of the case as a whole, and its judgment is in general void and therefore subject to collateral attack, but in accordance with principles which also form the basis for the familiar doctrine of res judicata the judgment *may*, after it becomes final, be binding upon the *parties* to the suit although not upon others, and the rights of *parties* may therefore be limited to appeal, writ of error, petition to vacate, or other methods of direct attack." *Old Colony Trust Co.* v. *Porter*, 324 Mass. 581, 586. See *Dennis* v. *Dennis*, 337 Mass. 1, 4. These principles are properly applicable to an objection to jurisdiction over the person. *Restatement: Judgments*, § 9, illustration 1, § 20, comment b. *Baldwin* v. *Iowa State Traveling Men's Assn.* 283 U. S. 522, 524–526. *American Sur. Co.* v. *Baldwin*, 287 U. S. 156, 166. *Treinies* v. *Sunshine Mining Co.* 308 U. S. 66, 78. *Durfee* v. *Duke*, 375 U. S. 106, 111–112. Compare *Stone Leather Co.* v. *Henry Boston & Sons, Ltd.* 234 Mass. 477, 478–479; *Harvey* v. *Fiduciary Trust Co.* 299 Mass. 457, 468–469; *Cohen* v. *Cohen*, 319 Mass. 31, 35–36.

In response to Ann's 1967 petition William entered a special appearance and made a special plea to the jurisdiction of the court over him. His special plea was overruled

and he did not appeal. The court had jurisdiction to rule on the special plea, and its ruling that it had jurisdiction over him was binding on him unless set aside on appeal or other direct attack. It follows that he was fully bound by the decree of August 1, 1967, and cannot now attack it collaterally.

2. *The separation agreement as a bar.* William contends that the separation agreement of February 1, 1955, bars the present suit, citing *Bailey* v. *Dillon*, 186 Mass. 244, and *Schillander* v. *Schillander*, 307 Mass. 96. By the separation agreement Ann covenanted with the trustees under the agreement that, if the payments by her husband were duly made, she would not seek any further support for herself or her two children, and that the instrument might be pleaded in bar of any petition for that purpose. William also contends that the oral agreement of August, 1963, providing for the support of the third child born in 1958, was void because William and Ann were not competent to contract with each other, citing *Bucklin* v. *National Shawmut Bank*, 355 Mass. 338.

On William's theory, it may be that the enforcement of the separation agreement should be sought by his trustee under the separation agreement rather than by him. G. L. c. 209, §§ 2, 6, as they were before St. 1963, c. 765, §§ 1 and 2. *Proctor* v. *Lombard*, 233 Mass. 213, 216. *Blumenthal* v. *Blumenthal*, 303 Mass. 275, 277. *Taylor* v. *Gowetz*, 339 Mass. 294, 297 n. Moreover, the bar, if it exists, would seem to have been equally a bar to Ann's 1967 petition. The attempt to assert it now may be a collateral attack on the decree of August 1, 1967, in violation of the principles of res judicata.

But we need not resolve these difficulties, since the separation agreement does not bar a proceeding under G. L. c. 209, § 32. That section provides that "upon the application of the . . . wife . . . the court may make further orders relative to the support of the wife and the care, custody and maintenance of their minor children . . . and may, from time to time, upon a similar application, revise and alter such order or make a new order or decree, as the circum-

stances of the parents or the benefit of the children may require." As we said in *Wilson* v. *Caswell*, 272 Mass. 297, 302, with respect to the similar power concerning alimony in G. L. c. 208, § 37, "The parties, by this agreement, cannot deprive the court of this power. . . . Husband and wife cannot by contract deprive the Probate Court of jurisdiction to modify a decree of alimony; or of power to consider their relation in connection with their contract and all other facts material to the issues properly before it in providing for the maintenance of wife or minor children, although the exercise of its jurisdiction may change in some respects their situation as contemplated by the contract." Compare *Bradford* v. *Bradford*, 296 Mass. 187, 189; *Kates* v. *Kates*, 347 Mass. 783; *Buchanan* v. *Buchanan*, 353 Mass. 351, 352–353; *Smith* v. *Smith*, Mass. , .*

3. *Want of equity.* William treats Ann's present petition as an attempt to state a basis for relief "cognizable under the general principles of equity jurisprudence, arising between husband and wife," under G. L. c. 208, § 33, as incorporated by reference by G. L. c. 209, § 33. On this basis he contends that no such cause is shown, citing *Blumenthal* v. *Blumenthal*, 303 Mass. 275, 278, *Whitney* v. *Whitney*, 316 Mass. 367, 370, and *Prahl* v. *Prahl*, 335 Mass. 483, 485. This contention seems to treat the petition as an attempt by Ann to enforce the separation agreement, and to rest in part on the contention we have rejected, that the August 1, 1967, decree was void.

We treat the petition as seeking modification and enforcement of the August 1, 1967, decree pursuant to G. L. c. 209, §§ 32, 33, and G. L. c. 208, §§ 12, 13. *Williamson* v. *Williamson*, 246 Mass. 270, 272–274. *Watts* v. *Watts*, 314 Mass. 129, 133–134. *Meyer* v. *Meyer*, 335 Mass. 293, 297–301. *Wilson* v. *Wilson*, 349 Mass. 29, 30. In such a proceeding, an attachment may be made by injunction, as in suits in equity, to reach property which cannot be reached to be attached as in an action at law. G. L. c. 215, § 6A. See *Ryder* v. *Ryder*, 322 Mass. 645, 648–650. Compare

* Mass. Adv. Sh. (1971) 7, 9.

Snyder v. *Smith*, 185 Mass. 58, 61–62; *Mosher* v. *Mosher*, 293 Mass. 105, 107; *Gulda* v. *Second Natl. Bank*, 323 Mass. 100, 104; *Katz* v. *Katz*, 330 Mass. 635, 639.

There was ample basis for such a proceeding on April 23, 1968, when the present petition was filed. After the support decree of August 1, 1967, William obtained the Georgia divorce decree and remarried. In February, 1968, William notified the trustees to stop providing educational support for the children. According to Ann's uncontradicted testimony, payments for February and March were not made, as the separation agreement provided, "not later than the fifth of each month." Nor were payments made "tax free," as required by the separation agreement. Compare *Meyer* v. *Meyer*, 335 Mass. 293, 297–301. Shortly after March 29, 1968, William instructed the trustees of the M. L. Madden trust to stop making payments to Ann, and in April, 1968, she paid her own income tax on his payments for the calendar year 1967. She was informed that he had refused to give the trustees the written authorization provided for in the separation agreement, and William admits that he has not given such written authorization.

4. *Effect of the Georgia divorce decree.* William asserted that the Georgia divorce decree was a bar to the maintenance of the present suit, and claims error in the judge's refusal to give the Georgia decree full faith and credit. Separate support under G. L. c. 209, § 32, is dependent on the existence of the marriage relation, and termination of that relation by a valid divorce decree rendered in another State entitles the husband to a discharge from his liability for payments which had not become due at the time of the divorce. *Rosa* v. *Rosa*, 296 Mass. 271, 272. *Heard* v. *Heard*, 323 Mass. 357, 361. *Shain* v. *Shain*, 324 Mass. 603, 604, cert. den. 338 U. S. 954. *Chittick* v. *Chittick*, 332 Mass. 554, 555. *Ingersoll* v. *Ingersoll*, 348 Mass. 209, 210–211.

But the Georgia divorce decree has the effect of terminating liability for support only if it is valid. *Welker* v. *Welker*, 325 Mass. 738, 743. *Barnard* v. *Barnard*, 331 Mass. 455, 457. *Ragucci* v. *Ragucci*, Mass. , .[b] Georgia

[b] Mass. Adv. Sh. (1970) 487, 489.

Code 1933, § 30–107, as amended by Ga. Laws (1958) No. 385, § 1, forbids the granting of a divorce to a person "who has not been a bona fide resident of the State six months before the filing of the application for divorce." William asserted in the trial court that the statute required "domicile" rather than "actual residence," citing *Williams* v. *Williams*, 191 Ga. 437. We assume that the judge accepted that assertion, and we accept it. William also conceded that the requirement was jurisdictional and that, since the divorce was based on constructive service on Ann without an appearance by her, the jurisdiction of the Georgia court could be challenged if he failed to meet the requirement. *Patterson* v. *Patterson*, 208 Ga. 7, 10–12 (Nevada divorce). *Garfi* v. *Garfi*, 327 Mass. 122, 123 (Nevada divorce). *Barnard* v. *Barnard*, 331 Mass. 455, 457 (Nevada divorce). *Adams* v. *Adams*, 338 Mass. 776, 781–782 (Illinois divorce). *Ingersoll* v. *Ingersoll*, 348 Mass. 209, 211 (Nevada divorce). *Rice* v. *Rice*, 336 U. S. 674.

The judge found that "William did not have a bona fide residence in the State of Georgia for the requisite period before he filed a petition for divorce." That finding is attacked on this appeal, and it is contrary to testimony given by William and to an allegation in Ann's petition of May 3, 1967. But the judge was not bound by William's testimony or by Ann's allegation in the prior suit. His finding is supported by his subsidiary findings and by substantial evidence, and we cannot say it is plainly wrong.

According to William's testimony, he first went to Atlanta late in November, 1966. This was the one day trip with his Boston attorney to visit his Georgia attorney with a view to divorce. He testified that he flew to Georgia again in December, returned to Boston later that month, drove to Atlanta late in December with Mrs. Z, and returned to Boston January 14–16 and January 25–29, 1967. On January 5, 1967, six months before he filed his petition for divorce, he was staying in a $10 a week apartment rented from his Georgia attorney; Mrs. Z was staying in the Marriott Hotel in Atlanta. When he returned to Boston January 25, he stayed at Mrs. Z's home in Wellesley. He gave a Massa-

chusetts return address on a valentine sent to his daughter in February, paid rent on his Massachusetts apartment until some time in February or March, sold his Massachusetts furniture in the early spring, gave a Massachusetts address on income tax returns signed in March, deposited the checks from the trustees in a Massachusetts bank until March, and did not give a notice of change of address to his life insurance companies until 1968. In July, 1967, Mrs. Z bought a house in Massachusetts, and William stayed there for a few days. Neither William nor Mrs. Z owns any real estate in Georgia. Georgia Code 1933, § 30–105, as amended by Ga. Laws (1967) No. 504, § 1, requires that a divorce petition show "whether or not there are any minor children of the parties and the name and age of each minor child." William's divorce petition failed to list the three minor children of the parties, or to mention Ann's petition then pending in Massachusetts. The judge found that the failure to list the children was intentional and for the purpose of deceiving the Georgia court.

On these facts we think the finding was justified that William's alleged domicil in Georgia was not bona fide. The case thus comes within the principle of *Patterson* v. *Patterson*, 208 Ga. 7, 11–12: "It would be an imposition on the . . . [Georgia] court for . . . [William] to represent himself as being a bona fide resident of that State, and would amount to such fraud on his part as to render the decree entered therein void." Under the United States Constitution, art. 4, § 1, and the governing Federal statute, decrees rendered in another State are entitled only to "the same full faith and credit . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U. S. C. (1964) § 1738. See *Heard* v. *Heard*, 323 Mass. 357, 364. The Georgia decree here in issue is not entitled to faith and credit in Massachusetts.

5. *The appointment of a successor trustee.* Paragraph 2 of the decree provides that William "is directed to appoint forthwith a Trustee in place of Lothrop Withington deceased, under separation agreement of February 1, 1955, and said party so appointed is made a party hereto."

William asserts that under the separation agreement, in the event of the death of trustee Withington, he was to "have the sole power to choose his successor," that this trust is not within the scope of the power of the courts to appoint trustees to fill vacancies under G. L. c. 203, § 5, et seq., and that the direction is a personal decree against William not warranted by his special appearance to defend his property. We agree that this paragraph of the decree, directing personal action by William, is erroneous in view of William's special appearance. *Schmidt* v. *Schmidt*, 280 Mass. 216, 217–218. *Mosher* v. *Mosher*, 293 Mass. 105, 106. *Wiley* v. *Wiley*, 328 Mass. 348, 349. Moreover, the appointment of a successor trustee is unnecessary. So far as Ann seeks enforcement of the separation agreement, her trustee is a party and has capacity to sue William and to seek an equitable attachment of William's property. A successor to William's trustee might be needed only if enforcement of the separation agreement against Ann were in question.

6. The decree appealed from is modified by striking out paragraph 2, and as so modified it is affirmed. Costs and expenses of appeal may be allowed to the appellee or her counsel in the discretion of the Probate Court.

So ordered.

William G. McRae, of Georgia, for William C. Madden.
Daniel J. Fern for Ann A. Madden.

APPENDIX III

COMMONWEALTH OF MASSACHUSETTS.
PROBATE COURT
Barnstable County Equity No. 87

ANN A. MADDEN et al.

v.

JAMES L. MADDEN et al.

Special Appearance of William C. Madden; Plea to Jurisdiction; and Motion to Dissolve Temporary Restraining Order and Dismiss Petition.

Comes now Respondent William C. Madden, a non-resident of the Commonwealth of Massachusetts, through his attorneys William G. McRae and Paul C. Wallace, and files this, his Special Appearance in the above-styled proceeding, appearing specially herein for the sole purpose of contesting the jurisdiction of the Court over respondent, who does not hereby appear generally or submit himself to the jurisdiction of the Court, and so appearing specially, files this, his plea to the jurisdiction of this Court, and for plea thereto says:

1. This respondent has not been served personally with citation or process issued upon the petition filed herein on May 3, 1967, by Ann A. Madden, or upon the petition filed herein on April 23, 1968, by Ann A. Madden and Herbert E. Hunziker, as her Trustee, and respondent has not waived personal service,

nor has this respondent appeared generally in either of said proceedings to submit himself to the jurisdiction of this Court.

2. Petitioners fail to allege in their petition filed on April 23, 1968, that they, or either of them, are a creditor of this respondent or that this respondent owes a debt to either of said petitioners, and in the absence of such allegation this Court lacked jurisdiction to enter the temporary restraining order entered herein on April 23, 1968, ordering James L. Madden, William T. Kemble and Henry H. Newell, Trustees under Trust Instrument dated September 6, 1923, and Trustees under will of Grace E. Madden, to desist and refrain from paying any income or principal from either trust to or for the benefit of William C. Madden, and this Court lacks jurisdiction to continue said temporary restraining order in effect, and the same should be vacated, set aside, and dissolved.

3. That portion of the decree of this Court entered August 1, 1967, upon the petition filed by Ann A. Madden in this court on May 3, 1967, which decreed that this respondent "pay to said petitioner for the support of herself the sum of Five Hundred Dollars ($500.00) per month and One Hundred Sixty-six and 67/100 ($166.67) dollars per month for each child, plus educational expenses for said minor children," is a decree in personam against this respondent, and said portion of the decree of August 1, 1967, is null and void, and of no binding legal effect whatsoever against this respondent, because:

(a) On May 3, 1967, this respondent was a resident of the State of Georgia, and a non-resident of this Commonwealth;

(b) This respondent was not personally served with notice of said petition within this Commonwealth;

(c) There was no attachment of this respondent's property in this Commonwealth prior to the entry of said decree on August 1, 1967;

(d) This respondent did not waive personal service of said petition filed May 3, 1967; and

(e) This respondent did not appear generally in said proceedings, but filed a special appearance only for the purpose of challenging the jurisdiction of the court.

4. That this Court lacks jurisdiction to modify the void decree respecting the personal obligations of this respondent which was entered on August 1, 1967, as prayed by petitioners.

5. That the decree in personam against this respondent in favor of Ann A. Madden, entered by this Court on August 1, 1967, upon the hearing of the petition filed by Ann A. Madden on May 3, 1967, is not a decree for a definite sum of money, and for that reason, even if said decree could be said to be valid, there is no debt due to Ann A. Madden by this respondent, and Ann A. Madden is not, by virtue of said decree, a creditor of this respondent within the meaning of G.L. c.214, §3(7), and this Court, therefore, lacked jurisdiction to enter said temporary restraining order of April 23, 1968.

6. This Court has never acquired jurisdiction over the person of this respondent,

and no property of this respondent was brought under the control of this Court, by attachment or other proceedings, prior to the entry by this Court of the decree in personam against this respondent, in favor of Ann A. Madden, on August 1, 1967, and said decree is, therefore, null and void. It is an indispensable prerequisite that this respondent must have owed a debt to the petitioners at the time of the filing of their petition herein on April 23, 1968, before this Court could have jurisdiction to issue the temporary restraining order entered on April 23, 1968, bringing this respondent's property under its control. The record of the proceedings of this Court upon the petition filed by Ann A. Madden against this respondent on May 3, 1967, and the petition of petitioners filed herein on April 23, 1968, fail to show that this respondent owed a debt to either of the petitioners on April 23, 1968. Therefore, this Court lacked jurisdiction to enter the temporary restraining order, entered on April 23, 1968, ordering James L. Madden, William T. Kemble and Henry H. Newell, Trustees under Trust Instrument dated September 6, 1923, and Trustees under Will of Grace E. Madden, to desist and refrain from paying any income or principal from either trust to or for the benefit of William C. Madden, and said temporary restraining order is, therefore, null and void. Said temporary restraining order is depriving this respondent of his property without due process of law, and contrary to and in violation of Section 1, Amendment XIV of the Constitution of the United States, which provides:

> "No State shall...deprive any person of life, liberty, or property, without due process of law;"

and said restraining order should be vacated,

set aside and dissolved.

Wherefore, the respondent, William C. Madden, prays:

(a) That the court will by its order, vacate, set aside and dissolve the temporary restraining order entered herein on April 23, 1968, ordering James L. Madden, William T. Kemble and Henry H. Newell, Trustees under Trust Instrument dated September 6, 1923, and Trustees under Will of Grace E. Madden, to desist and refrain from paying any income or principal from either trust to or for the benefit of William C. Madden.

(b) That this Court will by its order dismiss the petition filed herein by Ann A. Madden, and Herbert E. Hunziker, as her Trustee, on April 23, 1968.

(c) That this Court will enter its order requiring the petitioners Ann A. Madden, and Herbert E. Hunziker, as her Trustee, to show cause before this Court, on a day certain to be fixed by the Court, if any they can, why the prayers of this respondent for the dissolution of said temporary restraining order and for the dismissal of said petition should not be granted.

(d) For such other orders and decrees as the court shall deem meet and proper in the premises.

WILLIAM G. McRAE

address:
608 Lakeshore Dr., N.E.
Atlanta, Georgia 30307

PAUL C. WALLACE
Attorneys for Respondent
William C. Madden

address:
12 Hyde Park Avenue
Jamaica Plain, Mass. 02130

Filed May 28, 1968.

June 11, 1968.

After a hearing, the plea to jurisdiction, the motion to dissolve temporary restraining order and to dismiss petition are hereby denied.

ALFRED C. KNIGHT
Judge of Probate Court.

APPENDIX IV

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT
Barnstable County Equity No. 87

ANN A. MADDEN et al.

v.

JAMES L. MADDEN et al.

Claim of Appeal.

To the Honorable the Judge of the Probate Court in and for the County of Barnstable:

Respectfully represents William C. Madden of the State of Georgia in the County of De-Kalb, that he is one of the respondents in Equity Suit No. 87 in said Court between Ann A. Madden, and Herbert E. Hunziker as her Trustee, petitioners, versus James L. Madden et al., as Trustees, etc., and William C. Madden, respondents, wherein the Court issued a temporary restraining order restraining respondent Trustees from paying to or for the benefit of this respondent any funds from two certain Trusts of which this respondent is the current beneficiary. Respondent filed a special appearance therein for the purpose of challenging the jurisdiction of the Court, a plea to the jurisdiction, and a motion to dissolve the temporary restraining order and to dismiss the petition.

That he is aggrieved by a denial of the

Probate Court held at Barnstable, in said County of Barnstable, on the 11th day of June 1968, whereby said Court denied the plea to the jurisdiction, and the motion to dissolve the temporary restraining order and to dismiss the petition.

Continuing his special appearance, the respondent William C. Madden hereby gives notice that he claims an appeal from said denial to the Supreme Judicial Court.

Dated this twentieth day of June 1968.

By his Attorneys,

PAUL C. WALLACE

WILLIAM G. McRAE

Specially appearing.

Filed June 24, 1968.

APPENDIX V

COMMONWEALTH OF MASSACHUSETTS
PROBATE COURT
Barnstable County Equity No. 87

ANN A. MADDEN et al.

v.

JAMES L. MADDEN et al.

Claim of Appeal.

To the Honorable the Judge of the Probate Court in and for the County of Barnstable:

Respectfully represents William C. Madden of Atlanta in the County of DeKalb, State of Georgia, that he is one of the respondents to Petition in Equity No. 87 in the Probate Court of Barnstable County, filed by Ann A. Madden and Herbert E. Hunziker as her Trustee vs. James L. Madden et al., as Trustees, and William C. Madden.

That he is aggrieved by a decree of the Probate Court held at Barnstable, in said County of Barnstable, on the 22nd day of April 1969, whereby said Court entered a decree modifying a former decree of said Court, and by said modified decree requiring him to make separate support payments to Ann A. Madden for herself and for three minor children of William C. Madden and Ann A.

Madden, and which modified decree he contends is contrary to law.

[Here follows verbatim the decree of April 22, 1969]

And he hereby gives notice that he claims an appeal from said decree to the Supreme Judicial Court.

Dated this third day of May 1969.

By his Attorneys,

WILLIAM G. McRAE

PAUL C. WALLACE

Filed May 6, 1969.